Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-1577

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From the Supreme Court of Michigan

BRIEF FOR APPELLEE AGRICULTURAL MARKETING AND BARGAINING BOARD ON THE MERITS

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1983

QUESTION PRESENTED

WHETHER CERTAIN PROVISIONS OF THE MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT ARE PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967.

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Appellees.

On Appeal From the Supreme Court of Michigan

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case

In 1967, Congress enacted the Agricultural Fair Practices Act of 1967, 7 USC §§ 2301 *et seq* ("AFPA"). In its findings and declaration of policy the AFPA states that it is the policy of Congress to "establish standards of fair practices required of handlers in their dealings in agricultural products." 7 USC § 2301. The AFPA seeks to accomplish this goal by defining prohibited practices by handlers and granting the United States Department of Agriculture authority to enjoin such practices.

In 1972 the Michigan Legislature enacted the Agricultural Marketing and Bargaining Act, 1972 PA 344, as amended, Michigan Compiled Laws ("MCL") 290.701 *et seq*; MSA 12.94(101) *et seq* ("Michigan Act"). The Michigan Act is enabling legislation which affords farmers the option of joining together and bargaining collectively. Like the AFPA the Michigan Act defines prohibited practices by handlers. Both acts seek to advance the efficient production and marketing of agricultural products by protecting the marketing and bargaining position of the individual producers. While the AFPA attempts to do this solely through limiting handler coercion, the Michigan Act extends into an area not regulated by Congress. Under the Michigan Act, a framework for a marketing and bargaining procedure is implemented should a majority of the farmers producing a majority of the agricultural commodity so choose. The Michigan Act is not pre-empted because it does not stand as an obstacle to the full purposes and objectives of the AFPA.

B. Challenged Provisions of the Michigan Act.

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the challenged provisions of the Michigan Act.

C. Parties

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statements of the Case as it relates to the Parties.

D. Proceedings Below

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the proceedings below.

SUMMARY OF ARGUMENT

The Michigan Act allows the producers of perishable fruit and vegetables the opportunity to join together and bargain collectively. The Michigan Act sets forth an argricultural marketing and bargaining procedure to be followed only when a majority of the growers representing a majority of an argricultural commodity produced so choose.

The Michigan Act is not preempted by the AFPA. Congress has not preempted the field of regulation with regard to agricultural marketing and bargaining nor does the Michigan Act stand as an obstacle to the accomplishment of the full purposes and objectives of the AFPA.

The opportunity for a farmer to join or not join an association does not derive its existence from the AFPA—farmers could avail themselves of such action prior to its enactment. The AFPA was enacted solely to prohibit discriminatory practices from being used by handlers against farmers engaged in the process of joining or forming a cooperative association. The legislative history is devoid of any indication that Congress sought to erect a barrier to state regulation of agricultural marketing and bargaining, such as the Michigan Act.

The disclaimer section of the AFPA, 7 USC § 2304, neither creates nor secures in processors a right to deal with individual producers. It does no more than what its caption suggests: a disclaimer of intention to prohibit normal dealing. Its purpose was solely to define the limits of what Congress sought to accomplish through its enactment of the AFPA.

The Michigan Act like the AFPA fosters and promotes the efficient production and marketing of agricultural products by

protecting the marketing and bargaining position of individual producers. Because the purposes and objectives of both acts are in such close alignment there is no preemption.

ARGUMENT

I.

PRINCIPLES OF PREEMPTION.

The doctrine of federal preemption is rooted in Article VI, Clause 2 of the United States Constitution, the "Supremacy Clause", which elevates federal law above that of state law. On the other hand, under the 10th Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Where Congress legislates in an area which the states have traditionally occupied, analysis of whether preemption has occurred must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v *Sante Fe Elevator Corp*, 331 US 218, 230 (1947). Only when persuasive reasons exist that "the nature of the regulated subject matter permits no other conclusion" or where "Congress has unmistakably so ordained" that its enactments alone are to regulate a part of commerce, must state laws regulating a particular aspect of commerce fall. *Florida Lime and Avocado Growers, Inc* v *Paul*, 373 US 132, 144 (1963).

Preemption of state law will follow when such congressional mandate is explicitly stated in the federal statute's language or implicitly contained within its structure and purpose. *Jones* v *The Rath Packing Corp*, 430 US 519, 525 (1977). "The super-

vision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime and Avocado Growers Inc, supra,* 373 US at 144. Appellants correctly concede that Congress did not intend to occupy the entire field of regulation and thereby prohibit the States from enacting laws relating to agricultural marketing and bargaining. (Brief of Appellants on the Merits, p 11).

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v *Atlantic Richfield Co,* 435 US 151, 158 (1978). A conflict will be found when " 'compliance with both federal and state regulations is a physical impossibility . . . or when the state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress'." *Fidelity Federal Savings and Loan Assoc* v *de la Cuesta,* 458 US 141, 153 (1982).

While arguing generally that the AFPA and the Michigan Act are fundamentally inconsistent with one another, Appellants' argument centers on two alleged "conflicts". First, the Michigan Act ostensibly destroys a "farmer's right not to join or bargain through a cooperative", a "right" said to be created by 7 USC § 2303. The second conflict asserted is that the Michigan Act is contrary to an alleged Federal policy of protecting a processor's "right" to deal with farmers individually. A careful review of the pertinent provisions of the AFPA and underlying legislative history, however, demonstrates that there is no conflict between the purposes and objectives of the AFPA and the Michigan Act.

II.

THE AGRICULTURAL FAIR PRACTICES ACT DOES NOT PREEMPT THE MICHIGAN ACT WITH REFERENCE TO AN ALLEGED RIGHT OF NON-MEMBER PRODUCERS TO REFRAIN FROM JOINING COOPERATIVE ASSOCIATIONS.

A. The Michigan Act Is Consistent with the Purposes and Objectives of the AFPA and Does Not Require Producer Membership in a Cooperative Association.

The Michigan Act and the AFPA share a common purpose in that they both seek to permit farmers to associate together and thereby improve their marketing and bargaining position with food handlers. To this end both acts prohibit certain conduct, designated as unfair practices, by both handlers and associations of producers. 7 USC § 2303; MCL 290.704. The primary distinction between the two is that under the Michigan Act an association may become "accredited" and act as the exclusive sales representative for all those producers in the bargaining unit. MCL 290.710(1). Such producers are then bound, when dealing separately and individually with a handler, by all terms and conditions of the contract negotiated with handlers. For the services performed by the "accredited" association in its collective bargaining role a marketing service fee is charged to all producers in the bargaining unit. MCL 290.710(1).

The Michigan Act, standing alone, does not automatically require the imposition of a collective bargaining framework on the sale of a particular commodity. Rather, it is the producers who must decide whether or not they wish to avail themselves of its provisions. Moreover, the "accreditation" of the associa-

tion by the Board is subject to a statutory revocation process upon petition by the farmers. MCL 290.710(2); MCL 290.712.

A bargaining unit may only be established when the Agricultural Marketing and Bargaining Board, a state agency, has received a petition from not less than 10% of the producers of the commodity. MCL 290.706(1). Should the Board determine that a bargaining unit is appropriate, an association is eligible to become "accredited" provided it has signed contracts[1] from more than 50% of the producers of an argricultural commodity who produce more than 50% of that commodity. MCL 290.707(c).

The accreditation procedure is initiated by the association filing a written request with the Board. MCL 290.708(1). The request must contain properly certified evidence that the association meets the standards for accreditation along with names and addresses of all members who delivered the agricultural commodity to a handler during the two preceding marketing periods. MCL 290.708(1). The Board, for verification, may then require all handlers of an agricultural commodity to provide a certified report showing the names and addresses of all producers who delivered the agricultural commodity during the two marketing periods preceding the filing of reports and the quantities of the agricultural commodity received by the handler. MCL 290.708(2). If the Board determines that insufficient evidence was filed by the association, the Board, in its discretion, may permit the filing of an amended request by the association. MCL 290.709(1). Should the Board make a pre-

[1] The contracts must specify: (1) the agricultural commodity; (2) provide that such producers have appointed the aassociation as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity; and (3) obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association. MCL 290.707(c).

liminary finding that the association is to be accredited, a public hearing must be held to obtain further evidence relevant to the question whether the association is to be accredited. MCL 290.709(2).

Before the hearing may be commenced, all producers of record involved in the bargaining unit must be notified of the hearing by mail. MCL 290.709(2). In addition, a public notice must be published in a newspaper of general circulation in the bargaining unit area. MCL 290.709(2). The Board must render its final determination within 30 days from the date of the hearing. MCL 290.710(1). However, the Board must delay the accreditation of the association if it receives within the 30 day period a petition signed by 1/3 of the producers growing at least 1/3 of the commodity produced. In that event a mail referendum of all producers in the bargaining unit must be conducted. MCL 290.710(2). The referendum must verify that the majority of growers growing a majority of the commodity so assent. MCL 290.710(2). Only after all the procedural steps in the Michigan Act have been satisfied may the association be "accredited".

While the "accredited" association is designated as the exclusive sales representative for all producers in the bargaining unit, the practical effect is that not all producers or all the quantity of the agricultural commodity produced is subject to representation by that association. First, only those persons who have produced $1,250.00 or more of the commodity are included in the bargaining unit.[2] Handlers may continue to

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[2]

Rule 3 of the rules promulgated by the Agricultural Marketing and Bargaining Board provides:

> "The minimum value at first point of sale for an agricultural commodity that a person must have produced to be a producer of a commodity and included in a bargaining unit for the commodity shall be $1,250.00. However, the agricultural marketing and bar-

deal directly with such producers despite the accreditation. Second, the Board must exclude from the bargaining unit any quantity of the agricultural commodity contracted by producers with producer and controlled processing cooperatives. MCL 290.707(c). Third, any quantity produced by handlers is likewise excluded. MCL 290.707(c).

While non-members must pay marketing service fees, Rule 6 of the rules promulgated by the Agricultural Marketing and Bargaining Board limits both the amount and types of charges that may be assessed.[3] Moreover, the fees established by rule are subject to review by the Board upon petition by 15% of the producers. MCL 290.710(1).

Nothing in the Michigan Act requires a producer to become a member of, or join, an association. Indeed, many have not. Although the Michigan Act allows but does not require a maximum price to be agreed upon by the association and handlers, the practical effect of the Michigan Act has been only the establishment of a base price and minimum terms of trade. Producers have therefore been able to negotiate and receive a higher price than the price established by the association and handler. (See, e.g., testimony of Jack Leaver, trial transcript

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gaining board may determine that the minimum value at first point of sale should be larger based upon the evidence at the board's hearing to determine whether a proposed bargaining unit for the commodity is appropriate." Michigan Administrative Code 1979, R 290.103.

[3]
Rule 6.

"Marketing service fees for marketing and bargaining service provided producers in the bargaining unit shall be based solely upon the cost incurred by the association in providing the services. The fees shall not exceed 3% of the gross value of the commodity at the time of sale and shall not include costs of services to members that do not benefit non-members." Michigan Administrative Code 1979, R. 290.106.

pp 88-89; testimony of Rufus Dayton Hubbard, trial transcript, p 172; testimony of Harold Goodell, trial transcript pp 184-185.)

The Michigan Act is intentionally flexible so that it may not only reflect the wishes of the producers but that it may also respond to the ever-changing economic conditions which characterize the agricultural marketplace.

B. The Words "Refrain From Joining or Belonging to An Association of Producers" in 7 USC § 2303(a) Is Attributable to a Congressional Intent to Remain Neutral in the Question Whether Farmers Should Join Cooperatives.

The opportunity for a farmer to join or refrain from joining an association of producers does not derive its existence from the AFPA. As noted throughout the congressional debates, farmers could avail themselves of such action prior to the enactment of the AFPA, or, for that matter, prior to the enactment of the Capper-Volstead Act, 7 USC § 291-292.

The AFPA, the Capper-Volstead Act, and the Michigan Act seek to allow farmers to attain greater market power through combined effort. The Capper-Volstead Act effectuates this purpose by exempting farmer cooperatives from certain antitrust violations. The AFPA does so by prohibiting handlers from exerting discriminatory practices an improper pressure against farmers who are deciding whether to join an association. The Michigan Act, like the AFPA, prohibits such discriminatory practices by handlers, and additionally authorizes the implementation of a collective bargaining procedure when a majority of the farmers growing a majority of a commodity so agree.

The argument that the AFPA creates an unqualified and absolute right in the farmer not to join or bargain through a cooperative ignores Congress' longstanding policy creating an environment favorable to farmers' collective action.[4] Moreover, such an argument fails to recognize both the limited purpose of the AFPA and the reasons why certain language was used as is revealed in its copious legislative history.

The need for national legislation to prohibit unfair and coercive tactics employed by handlers to discourage farmers from forming, joining, or remaining in, an association was demonstrated when Senate hearings regarding the matter were convened on June 14, 1966. Farmers testifying at the hearings told of having purchases by handlers either reduced[5] or completely eliminated [6] as a result of their joining an association. Economic sanctions by handlers or their agents, however, represented only a part of the tactical inventory employed as farmers were subjected to intimidation[7] and other forms of disparate treatment.[8] Together the testimony vividly painted a picture of active discrimination by handlers.

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[4]

See, H.R. Rep. No. 824, 90th Cong, 1st Sess. 3 (1979).

[5]

See, *e.g. 1966 Senate Hearings, (June 14-16)* on S. 109, 89th Cong, 2nd Sess, 17-18 (statement of Robert Summer, Tiffin, Ohio), 28-32 (Statement of Ralph Gillmor, Freemont, Ohio).

[6]

Ibid, 84 (statement of Ellis Hale, Waldron, Arkansas).

[7]

Ibid, 86

"The first advertised meeting [of the association] in our county was held at the county courthouse in Waldron, Arkansas. As the farmers arrived at the appointed time we found that the local poultry company had cars and trucks parked strategically on the square around the courthouse. The poultry company officials were situated in the different approaches to the courthouse so that each farmer attending knew that he was being watched and it was

The problem of discrimination against farmers and farmer cooperatives was compounded by the fact that an appropriate remedy or expeditious federal recourse simply was not available. The cost of bringing and maintaining a civil action against a processor or processors was prohibitive. The handling of complaints registered with federal agencies proved to be both unsatisfactory and time consuming.[9] Moreover, the fact that large food suppliers secured their needed supplies from several states underscored the conclusion that only federal law could provide an antidote to the challenge of the changing economic organization in agriculture.[10]

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clearly evident that the poultry company was trying to discourage attendance. During the course of the meeting a poultry company truck with a loud or no muffler gunned or raced its motor near the courthouse for quite some time, drowning out the speaker's words."

[8]

See, *1966 Senate Hearings*, 17 (statement of Robert Summer, Tiffin, Ohio)

"Then, too, Heinz would give me only 40 hampers per acre. Others got twice as many. This made my harvest and deliveries very slow. It is not hard for processors to hurt you. They can decide who gets plants first in the spring, how to arrange delivery schedules, and many other things."

[9]

In Ohio, on two occasions, tomato growers attempting to organize were met with substantial processor resistance. Although the Federal Trade Commission issued a cease and desist order against processors, preventing conspiring and engaging in a planned common course of action to boycott certain tomato growers, it was set aside years later by the U. S. Court of Appeals. On the second occasion it became clear that while collusion among processors fell within the jurisdiction of the FTC, individual acts by these same processors against growers or their associations did not. See, R. Torgerson, *Producer Power at the Bargaining Table: A case study of the Legislative Life of S. 109*, at 3-6 (1970).

[10]

Ibid, 18.

What ultimately became the AFPA was originally proposed as an amendment to the Capper-Volstead Act as Senate Bill 109. In the staff report, S. 109 was described as "prohibiting certain purchasers of agricultural commodities from performing specified acts injurious to other producer cooperatives, e.g., interference with producers joining or continuing as members, discrimination against members, and making false reports".[11] S. 109's sponsor, Senator George D. Aiken, stated its purpose: "This bill does not in any way grant special privileges to farmers, to farmer cooperatives or to agricultural associations of any kind. It undertakes to give them the same rights and protection as are now enjoyed by the people they have to deal with".[12] Included in S. 109 in its original form as Section 3(a), was the forerunner to 7 USC § 2303(a) which made it unlawful for a handler "to interfere with, restrain, coerce, or boycott any agricultural producer in this exercise of his rights to join and belong to an association of producers of agricultural products."[13]

The 1966 Senate Hearings on S. 109 demonstrated wide support by farm groups. Proponents of the bill included Charles B. Shuman, President of the American Farm Bureau, who testified that although farmers had the opportunity to market through cooperative associations, such activity was not completely protected since the scales of bargaining power were weighted heavily in favor of buyers.[14] Two reasons were

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[11]

See, *1966 Senate Hearings*, 2.

[12]

See, *1966 Senate Hearings*, 2-3 (statement of Hon. George D. Aiken, a U.S. Senator from the State of Vermont).

[13]

Ibid, 2.

[14]

See, *e.g. 1966 Senate Hearings*, 10-15 (statement of Charles B. Shuman, President, American Farm Bureau Federation.

given for this imbalance in bargaining power. First, processors had grown to huge proportions through acquisitions, mergers and diversification. Second, farmers frequently had been discouraged by handlers from exercising their right to act cooperatively by reprisals and fears of reprisals.[15]

In his book chronicling the legislative history of S. 109, Dr. Randall Torgerson characterized the opponents of the bill as being divided into three groups: (a) those concerned about the antitrust overtones of the bill and the possibility that bargaining might curb competition; (b) those disturbed about the one-sidedness of the bill and for strategic reasons stressed protection for the farmers' right not to join an association; and (c) those who consisted of "fence riders" who would not take a firm position on the bill but nonetheless implied an attitude of opposition to it.[16]

Following the 1966 Senate Hearings a substitute version of S. 109 emerged. Rather than being an amendment to the Capper-Volstead Act, the substitute was to be a separate act and carried a new title: "Agricultural Producers Marketing Act of 1966". Also, the substitute version contained six sections instead of three as in the original.[17] Section 2, the Legislative Findings and Declaration of Policy provision, relevantly stated that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to band together in cooperative organizations authorized by law."[18]

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[15]
Ibid.

[16]
See, R. Torgerson, *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at 62 (1970).

[17]
See, *1966 Senate Hearings, Part II (September 28, 1966), A Substitute Amendment to S. 109*, 89th Cong, 2nd Sess, 175-177.

[18]
Ibid, 175.

The provision which ultimately became 7 USC § 2303(a), section 4(a) of the substitute,[19] like the earlier language, did not provide that a farmer had the right to "refrain from joining or belonging to an association of producers."[20] Clearly many of those speaking at the subsequent 1967 Senate hearings, in support of the substitute version, believed that such additional wording was unnecessary as farmers always could refrain from joining an association.[21]

Senator Lausche, a co-sponsor of the bill, commenting on the substitute stated: "This bill does not force farmers to belong to associations. That decision is completely up to them, being permitted to join or not to join."[22] Nevertheless, opponents of the bill continued to object to the prohibited practices section, maintaining it failed to protect a farmer from an association if that farmer chose to refrain from joining or belonging

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[19]

Ibid, 175.

[20]

The full text of Section 4(a) of the Senate substitute version provided:

> "Sec. 4. It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices.
>
> (a) to interfere with or restrain, or threaten to interfere with or restrain, by boycott, coercion, or any unfair or deceptive act or practice, any producer in the exercise of his rights to join and belong to an association of producers. . . ." Ibid.

To like effect, see Section 4(a) as re-marked after the 1966 Senate Hearings, and which appears in 1967 Senate Hearings on S. 109, 90th Cong, 1st Sess (May 2, 4 and 11) at 2.

[21]

See, *1967 Senate Hearings*, 10 (Statement of Hon. John J. Williams, a U.S. Senator from the State of Delaware), 13-14 (Statement of Hon. Frank J. Lausche, a U.S. Senator from the State of Ohio), 21 (Statement of Hon. Orville L. Freeman, Secretary of Agriculture).

[22]

See, *1967 Senate Hearings*, 13-14 (statement of Hon. Frank J. Lausche, a U.S. Senator from the State of Ohio).

to that association.[23] While this argument was urged throughout the legislative genesis of the AFPA, not once was there ever presented any evidence of an association of producers coercing a farmer to join. Despite this fact, the bill, when reported out of the Senate Subcommittee and passed by the Senate, provided in section 4(a) that handlers and associations of producers were prohibited from actions to influence producers "to refrain from joining or belonging to an association of producers".[24]

Appellants urge that Senate's action in including such words in Section 4(a) created an absolute and unqualified right in the farmers to refrain from joining or bargaining through an association. This conclusion is not justified. The Subcommittee, and the Senate in passing the bill on August 4, 1967, no more sought to encourage farmers to join an association than it sought to encourage them to refrain from joining an association. Its position was one of decided neutrality on the question. Rather, the Subcommittee's change was in response to those who argued that S. 109 sought to encourage association membership, and represented the manifestation of its belief that Congress should remain neutral on the question whether a farmer should join an association. It was not its purpose to create a right for a farmer to (a) join an association or (b) refrain from joining an association. This was reflected in the Committee report:

> ". . . The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced

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[23]

See, *e.g. 1967 Senate Hearings*, 84 (Statement of Edward Dunkelberger, on behalf of the National Canners Association).

[24]

See, *1967 House Hearings on S. 109*, 90th Cong, 1st Sess (September 21 and 22, 1967), 2.

by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction."[25]

The Senate's neutrality was also evinced in section 2 of the bill, the Legislative Findings and Declaration of Policy section, which pertinently stated: "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together or not to join together in cooperative organizations as autrorized by law."[26]

The Senate version was then sent to the House where hearings were convened on September 21, 1967. Among the first to testify was Assistant Secretary of Agriculture John A. Baker who urged the deletion of the phrase "or to refrain from joining or belonging to" from Section 4(a),[27] on the basis that there was a clear lack of evidence of abuses by associations of producers.[28] "This language places in doubt longstanding congressional policy of promoting growth and development of farmer cooperatives. This language implies that farmers now need protection from their own cooperative organizations."[29]

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[25]

S. Rep. 474, 90th Cong., 1st Sess. (1967) as reprinted in 1968 US Code Congressional and Administrative News, p 1871.

[26]

See *1967 House Hearings*, 2.

[27]

See, *e.g.*, *1967 House Hearings* 10 (Statement of John A. Baker, Assistant Secretary of Agriculture; accompanied by John G. Bagwell, General Counsel, U.S. Department of Agriculture).

[28]

Ibid, 9.

[29]

Ibid. The government's reasoning was more forcefully put by its general counsel who stated at 16:

'. . . to come along now and have the Congress of the United States declare as a policy that farmers shall have a right 'not to

But the fundamental purpose of S. 109, to protect the farmer's choice whether to belong to an association and be free from discriminatory practices in crop marketing and bargaining, remained unchanged. This was reflected in the House Report following its hearing which stated "The purpose of this bill is to strengthen the competitive marketing system for agricultural commodities by creating several new legal remedies designed to prohibit certain unfair trade practices'.'[30]

The limited purpose of the bill was underscored by Rep. Poage, Chairman of the House Committee on Agriculture, during the House Debate:

> "It [AFPA] prohibits discrimination only when the discrimination is based upon the membership or lack of membership of a producer in an agricultural cooperative. And that is all there is to the bill. *It does not go into this question of marketing rights, it does not go into any of these ancillary questions,* it does not try to solve the question of labor and management. It simply tries to solve this one specific problem that we believe is important in a few instances in the United States." [Emphasis added.] [114 Cong. Rec. 7454 (1968)]

The House amended substitute S. 109 by engrafting thereon the provisions of H.R. 13541, and, as so amended, passed S. 109. See 114 Cong Rec 7468-7469 (1968). As passed by the

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join' in a bill of this sort simply confuses the issue of what we are trying to do. As everyone who is a lawyer in this committee room knows—and there are many of you here—it's an old saying among lawyers 'When you have a poor case, confuse the Court'. And if you want to confuse the Court, in my opinion, S. 109 as it came over from the Senate will do that pretty well, as to what the objective of that bill is and what we are trying to do."

[30]

See, H.R. Rep, No. 824, 90th Cong, 1st Sess 1 (1967).

House, section 2, the Legislative Findings and Declaration of Policy provisions, pertinently stated that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law." 114 Cong Rec 7469 (1968). The Senate thereafter concurred in the House amendments, and S. 109 was signed into law by President Johnson on April 16, 1968.

The congressional declaration in section 2, which appears as 7 USC § 2301, is one of deliberate neutrality. This Court has recognized the significance of such findings and statements. See, e.g. *Russello* v *United States*, ... US ...., 52 Law Week 4003 (decided November 1, 1983). Coupled with the declaration underlying 7 USC § 2305(d), amplified in Section III *infra*, at pages 23-25, that supplementary state law should not be superseded or preempted by the federal act, the majoritian-based collective bargaining mechanism that the Michigan Act employs to further effectuate the AFPA is constitutionally co-extensive and harmonious, as determined by the Michigan Supreme Court.

C. The Definition of a "handler" in the AFPA Should Be Limited Since It was Substantially Changed by A Last Minute House Amendment Which Was Not Debated.

Appellants make much to do about an association of producers being included within the definition of a handler within the AFPA. See 7 USC § 2302(a). But a review of the legislative history of this definitional section reveals that the intended scope of including associations within the definition was transformed by a last minute amendment on the House floor to which there was absolutely no debate or elucidation as to the significance of such a change.

As previously noted, some of those testifying against the original version of S. 109 remonstrated that it did not protect farmers from coercive tactics by an association attempting to influence a farmer's decision to join. See, II B, *supra*. The only logical reason advanced for making the prohibited practices applicable to cooperative associations was that *some* of these associations were in direct competition with handlers in acquiring agricultural commodities.[31] The Senate Subcommittee members conducting the hearings, although there was no evidence of coercive tactics being used by assocations, stated they were "convinced by the logic of the situation"[32] and inserted the term "association of producers" throughout the bill to insure that it would apply to associations of producers. After Senate approval of S. 109 it was sent to the House.

Following hearings before the House Committee on Agriculture an amendment was offered to delete the application of any prohibited practices or sanctions to associations of producers. The amendment was defeated. Explaining this action it was stated:

> "The committee felt that *in those limited instances* where cooperative associations are covered, the application of the bill is both justified and in the interest of the producers themselves." [Emphasis added.]
>
> H.R. Rep. 824, 90th Cong., 1st Sess. (1967)

Thus, the Committee report indicates that not all associations of producers would be subject to the AFPA's prohibition

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[31]

See, *e.g. 1968 Senate Hearings*, 135 (Statement of A. Starke Taylor, Jr., Independent Cotton Industries Association), 138-140 (Statement of Paul L. Courtney, National Association of Wholesalers).

[32]

See S. Rep. 474, 90th Cong, 1st Sess (1967) p 4.

or that associations might not be subject to such prohibitions at all times. Such an interpretation is considerably narrower than what has been alleged.

When S. 109 reached the floor of the House, Representative Sisk proposed several amendments striking of the words "association of producers." Such action was consistent with the Committee action, as Representative Sisk explained: "The Bill is clear, whether a handler of agricultural products is a proprietary business or a cooperative, it should not engage in specified unfair practices." See, 114 Cong. Rec. 7464. Additionally, Rep. Sisk indicated:

> "Since the bill already makes clear that association of producers are not excluded from the term 'handler', this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult."
> 114 Cong. Rec. 7464 (1968)

Thereupon, the Sisk amendments were debated and agreed to. Following the approval of the Sisk amendment Representative Latta then sought to amend S. 109. In his book *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at p. 196, Dr. Randall Torgerson provides the following account:

> "The next amendment was offered by Congressman Latta of Ohio, and in introducing it, Latta indicated that his proposals were those discussed earlier in a colloquy with Poage. However. when the Latta amendment was introduced, it contained more than the mere insertion of commas and the addition of the word 'or', as he had earlier

> indicated would be the case. Each of Latta's changes seemed aimed at the definition of the term 'handler' and seemed an attempt to assure that bargaining associations would be covered by the prohibitions of the bill. The intention became absolutely clear when Latta unexpectedly proposed including the words 'with or on behalf of' in the phrase relating to contracting. His additions changed the definition of handler to include 'any person engaged in the business or practice of . . . (3) contracting or negotiating contracts or other arrangements, written or oral *with* or *on behalf of* producers or associations of producers with respect to the production or marketing of any agricultural products.'"

The change went unnoticed and the scope of Section 3(a)(3) [7 USC § 2303(a)(3)] was thus enlarged to include all associations into the definition of a handler, rather than just those associations who acquired products and were in direct competition with other non-association food handlers. This last-minute maneuver was subjected to no debate or scrutiny—in stark contrast to virtually every other provision of the AFPA. Under these circumstances, the normal presumption — that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended" (*Russello* v *U.S.*, *supra*, 52 Law Week at 4006)—should not be indulged.

III.

THERE IS NO INDICATION IN THE AGRICULTURAL FAIR PRACTICES ACT THAT CONGRESS SOUGHT TO ERECT A BARRIER TO STATE REGULATION OF AGRICULTURAL MARKETING AND BARGAINING.

The AFPA, 7 USC § 2305(d), pertinently states:

> "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

This explicit declaration of non-preemption signals the congressional intent not to intrude upon a state's regulation of agricultural marketing and bargaining. Such action is consistent with this Nation's historic policy of favoring state regulation of agriculture. The language set forth in 7 USC § 2305(d) was crafted by the House Committee on Agriculture, which, in explaining its amendatory action, stated:

> "This amendment was adopted to clarify the committee's intent that no state law should be superseded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies." H.R. Rep 824, 90th Cong, 1st Sess 4 (1967)

The House Committee's wording expanded upon the much narrower substitute amendment to S. 109 that had passed the Senate, and which provided as Section 6(3) "the foregoing provisions shall not be construed to deprive proper state courts of jurisdiction." 1967 House Hearings (September 21 and 22) on S.109, 90th Cong, 1st Sess, 3. Thus, it is clear that Congress not only wanted to preserve existing state law but also sought to maintain a favorable climate for state regulation in the future.

With respect to state laws in existence at the time the AFPA became effective, the California Agricultural Producers Marketing Law, California Agricultural Code, § 59501 *et seq*, is of particular note.[33] This law is the successor to the California Agricultural Prorate Act, St. Cal. 1933, p 1969, which was reviewed by this Court in *Parker* v *Brown*, 317 US 341 (1943). The California Agricultural Prorate Act was found to represent "state action" and as such was exempt from the provisions of the Sherman Act which made combinations in restraint of trade illegal. While there are some minor differences between the present California law and its predecessor, the concept of state action embodied in both is identical. Moreover, the same concept of state action is to be found in the Michigan Act.

Under the California Agricultural Producers Marketing Law a minority of the producers of an agricultural commodity may petition for the establishment of a proration program. § 59641 [Prorate Act, § 8].[34] Upon receipt of the petition a hearing is conducted by the state Director of Agriculture[35] to determine the size of the proration zone and whether a program is consistent with developing orderly markets. § 59655-59659 [Prorate Act, § 9]. When a majority of the producers of an agricultural commodity who grow the majority of that commodity so assent a program is established. § 59855 [Prorate Act, § 11]. Once established all producers growing the crop

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[33]

The California Agricultural Producers Marketing Law, § 59501 *et seq* was enacted into law by Stats. 1967, c.15, § 2, and became effective November 8, 1967. The AFPA was signed into law by President Lyndon B. Johnson, in Honolulu, Hawaii on April 16, 1968.

[34]

Analogous provisions contained in The California Agricultural Prorate Act are cited after the applicable section of the current California Agricultural Code.

[35]

Under the Prorate Act the hearing was conducted by the Agricultural Prorate Commission.

are bound by actions of the program committee which includes limiting the amount of the commodity that may be sold in addition to requiring the producer to sell a certain amount to the committee, § 59803, 59807 [Prorate Act, § 19.1]. The program committe itself is composed not of state officials but of producers included in the proration zone § 59855 [Prorate Act, § 18]. For the services performed by the Committee all producers are assessed a fee, § 59941 [Prorate Act, § 21]. At any time after a program is instituted it may be terminated upon submission of a petition requesting termination and signed by not less than 40 percent of the producers of the commodity in the proration zone that produced not less than 40 percent of the commodity affected that was produced within the proration zone during the last preceeding season. § 59984 [Prorate Act, § 23].

The Michigan Act embodies virtually the same concept of state action. Producers of an agricultural commodity may petition for the establishment of a bargaining unit. MCL 290.706(1). The Agricultural Marketing and Bargaining Board, a state agency, must then make a determination as to the size of the bargaining unit. MCL 290.706(2). Should a majority of the farmers producing a majority of the commodity so choose, an association may become "accredited" and act as the exclusive representative of all producers in the bargaining unit. MCL 290.707(c). For the services performed by the association all producers in the bargaining unit are assessed a marketing service fee. MCL 290.710(1). Finally, an association's accreditation may be revoked at any time by a petition requesting disaccreditation and signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the bargaining unit production of the agricultural commodity. MCL 290.712.

In conclusion, 7 USC § 2305(d) provides that existing and supplemental state law would not be preempted. The Mich-

igan Act was enacted in 1972, four years after passage of the AFPA. Its framework is substantially the same as the present California law, whose predecessor was sustained by this Court in *Parker* v *Brown, supra.* Accordingly, the Michigan Act, like the California law, is preserved by 7 USC § 2305(d).

IV.

THE MICHIGAN ACT IS VALID UNDER THE DOCTRINE OF STATE ACTION AS ENUNCIATED IN PARKER v BROWN

7 USC § 2303, in pertinent part, provides:

> "It shall be unlawful for any *handler* knowingly to engage or permit any employee or agent to engage in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an assocation of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association:
>
> • • •
>
> (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; . . ."
>
> [Emphasis added]

As the Michigan Supreme Court correctly noted (J.S. App. A9-A11),[36] 7 USC § 2303 is expressly directed toward *handler* misconduct. Such a prohibition, however, does not forbid a *state* from requiring the exclusive representation of farmers where a majority who are producing a majority of the commodity so desires, as under the Michigan Act.

A useful analogy is the California Agricultural Prorate Act of 1933[37] which was held not preempted in *Parker* v *Brown, supra.* In *Parker,* the plaintiff, a producer and packer of raisins, sought to enjoin the enforcement of a raisin prorate marketing program established pursuant to the California Agricultural Prorate Act. The express purpose of the program, as authorized by the California Act, was to conserve the state's agricultural wealth and prevent economic waste in marketing state products. 317 US at 346. One of the issues that arose during

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[36]

Citations to the appendix to the Jurisdictional Statement are made as follows: "J.S. App .....".

[37]

The similarities between the Michigan Act and the California Agricultural Prorate Act are pronounced. Both create a state agency composed of members appointed by the Governor and confirmed by the senate. Each is charged with enforcing the provisions of their respective acts. Under both acts, a specified number of producers may petition for the establishment of a program (California) or the establishment of a bargaining unit (Michigan). The public body in both instances is required to make a specific determination: in California—whether the institution of a program in a particular zone will prevent agricultural waste and conserve agricultural wealth; in Michigan—whether a proposed bargaining unit is appropriate. In both instances a committee or association, *composed of non-state officials,* is given authority to operate the program or conduct negotiations regarding terms of trade, after a majority of the producers who produce a majority of the commodity so approve. See, California Agricultural Prorate Act, § 19.1 "In any marketing program approved by the Commission, a program committee shall be empowered to determine the method, manner and extent of proration and the movement of the prorated commodity into a primary channel of distribution."

the course of the litigation was whether the California Act was in conflict with the Sherman Act which prohibited "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States." 317 US at 350. This Court assumed that had the prorate program been solely the product of a private combination of individuals or corporations, a violation of the Sherman Act would exist:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."
>
> 317 US at 350-351.

Significantly this Court then noted:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations [§ 7], and it authorizes suits under it by persons and corporations [§ 15]. A state may maintain a suit for damages under it, Georgia v Evans, 316 US 159, 86 L ed 1346, 62 S Ct 972, but the United States may not, United States v. Cooper Corp. 312 US 600, 35 L ed 1071, 61 S Ct 742—conclusions

derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

317 US at 351

The parallel to the instant case is striking in that a "state" is similarly excluded from the definition of a "person", 7 USC § 2302(d). Therefore, a state may not be construed as a "handler" under 7 USC § 2302(a). Similarly, in *Parker* v *Brown, supra,* there was no suggestion in the legislative history of the Sherman Act that its purpose was to restrain state action. Rather it was enacted to prevent only "business combinations." In conclusion this Court held in *Parker* v *Brown*:

". . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. *It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. *The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.* The required vote on the referendum is one of these conditions.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." [Emphasis added]

317 US at 352.

Likewise, in the AFPA, Congress did not undertake to compel states, or restrain them, from enacting legislation which would enable farmers to improve their marketing and bargaining position when dealing with food processors. AFPA's purpose was to prohibit certain handler conduct. There is no suggestion in its legislative history which would indicate that action by a State was to be proscribed.

Appellants' Brief on the Merits, pp 27-30 ascribes considerable significance to subsequent decisions and opinions of this Court and its members which are claimed to have limited the scope of *Parker v Brown*. None of these subsequent cases, however, undermine the fundamental interpretational concept established by *Parker*—that the Congress, when enacting general economic legislation interdicting the actions of nongovernmental persons or entities, will be regarded as intending to preclude state legislation in related areas only if such intent is supported by underlying legislative history.

Although the doctrine of "state action" in *Parker* v *Brown* has been refined further in subsequent cases, none change the result that the Michigan Act is valid and non-preempted.

Schwegmann Bros v Calvert Corp, 341 US 384 (1951) involved a Louisiana statute which authorized the fixing of retail prices by private parties. Under that statute once a single retailer agreed with a distributor on a resale price all other re-

tailers were bound to sell at that price. 341 US at 387. Schwegmann Brothers, a retailer in New Orleans refused to agree to the price fixing scheme whereupon the Calvert Corporation brought suit under the Louisiana law to enjoin Schwegmann Brothers from selling its products at a cut rate price. The District Court granted an injunction which was affirmed by the Court of Appeals. This Court reversed and held that price fixing contracts were unenforceable against retailers who refused to agree to the price fixing scheme.

The holding in *Schwegmann*, however, may be distinguished from the present case on a number of grounds. First, the issue before the Court in Schwegmann was not the concept of "state action" which was set forth in *Parker* v *Brown*. Indeed the phrase "state action" does not appear once in Schwegmann. Rather the issue was how the Miller-Tydings Act, an amendment to the Sherman Act, 15 USC §1, was to be interpreted.

Second, in *Schwegmann*, two persons, one a retailer and one a distributor, could bind all other retailers and distributors with impunity. Their actions were not subject to review by other retailers or distributors or by a state agency. Under the Michigan Act, an association cannot become the exclusive sales representative of all producers in the bargaining unit until it has completed the rigorous statutory procedure for "accreditation". See II(a), *supra*. Additionally, even if the majority of the producers so consent and an association is accredited its accreditation is subject to revocation by the Board through a petition by the producers. MCL 290.712(b). The Michigan Act can be further distinguished in that a state agency has been created to monitor the activities of the parties. MCL 290.703. Should the parties be unable to agree they may request the Board to assist by mediation (MCL 290.714) or if no agreement is reached by the first day of the marketing period they must enter into binding arbitration. MCL 240.716. Finally, at various stages in the marketing and bargaining framework the

Michigan Act requires [38] compliance with the state Administrative Procedures Act, 1969 PA 306, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*, which is applicable only to state agencies and not to disputes involving only private parties.

In *Goldfarb* v *Virginia State Bar*, 421 US 773 (1975), a minimum fee schedule for lawyers published by a county bar association and adhered to at the prompting of the state bar was struck down as being in violation of federal antitrust laws. The state action immunity doctrine as set forth in *Parker* was held not to apply. "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 US at 790. Since the minimum fee schedule was initiated by the county bar and encouraged by the state bar, a self-regulatory body with no authority delegated by either the Legislature or high court to impose competitive restraints on the legal profession, its use was not immune as state action because it was not "compelled by the State acting as sovereign." 421 US at 791.

The Michigan Act meets the threshold standard set forth in *Goldfarb*. The collective bargaining model, which may become operative after a majority of growers representing a majority of the commodity grown so petition, is required by the State of Michigan acting as a sovereign. Moreover, similar to *Goldfarb* where this Court opined that the "interest of States in regulating lawyers is especially great" (421 US at 792), "agricultural marketing and supervision is of "peculiarly local concern." *Florida Lime and Avocado Growers, Inc, supra*, 373 US at 144.

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[38]

Compliance with the State Administrative Procedures Act, 1969 PA 306 is required by the Michigan Act at MCL 290.703(8); MCL 290.704(3); MCL 290.706(1); MCL 290.716(1); see also Opinion of the Michigan Supreme Court. J.S. App A26-A32.

This Court, in *Cantor* v *Detroit Edison Co*, 428 US 579 (1976) held that a lamp exchange program by a utility, regulated by the state public service commission, did not constitute state action. The Court limited the doctrine enunciated in *Parker* v *Brown* to "official action taken by state officials" 428 US at 591. The *Cantor* plurality held state action was not involved because: (a) no state officials or agencies were named as parties; and (b) no legislative act of the state was in question. In the present controversy not only is a state agency a named party but an act of the Michigan Legislature effectuating statewide agricultural policy is being directly challenged.

In *Bates* v *State Bar of Arizona*, 433 US 350 (1977) a statewide ban on advertising by attorneys was challenged on several grounds. Among those was the contention that the ban was in violation of the Sherman Act. A "state action immunity" defense was proffered and accepted by the Court. The holdings in *Goldfarb* and *Cantor* were distinguished from the controversy in *Bates*. The real party in interest, the Court noted, was the Arizona Supreme Court as it had adopted the rules and was the ultimate trier of fact and law in the enforcement process. 433 US at 361. Second, the state regulatory justification in *Bates* outweighed any federal antitrust policy. This was not the case in *Cantor* where the state had no independent regulatory interest in the market for lightbulbs. 428 US at 585.

With respect to the case at bar, it is clear that the State of Michigan is the real party in interest since it enacted the Michigan Act and provided for the option of mandatory collective bargaining. Moreover, the State, through its Agricultural Marketing and Bargaining Board, is the ultimate trier of fact with respect to alleged unfair practices and becomes actively involved when the parties are unable to agree upon terms of trade. Secondly, the regulatory justification for the

Michigan Act was well documented at trial, as the Michigan Supreme Court perceptively noted in its opinion.[39]

A California statute designed to remedy the disparity in bargaining power between automobile manufacturers and their dealers, by protecting retail car dealers from perceived abusive and oppressive acts by manufacturers, was upheld by this Court in *New Motor Vehicle Board* v *Orrin W. Fox Co*, 439 US 96 (1978). The California Act required an automobile manufacturer who proposed to establish a new retail automobile dealership to notify the California New Motor Vehicle Board. Notice was then given to existing dealers; upon dealer objection a hearing would be held to determine if there was good cause shown to refuse permission to open the new dealership. It was argued that by delaying establishment of automobile dealerships whenever competing dealers protested, the state scheme gave effect to privately initiated restraints on trade in violation of the Sherman Act. This Court held that the California Act represented a state-imposed system of regulation, clearly articulated and affirmatively expressed, and, therefore, outside the reach of the antitrust laws under the "state action" exemption. The California Act did not forfeit its antitrust exemption because it afforded existing dealers the opportunity to invoke a statutory right to be heard. The Michigan

[39]

"Our reading of the act, examination of the circuit judge's opinion and review of the record leads us to conclude that the AMABA was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, viz, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. AMABA is not a price fixing act, nor is it intended to allow association control of the output of individual farmers. It is, rather, an enabling act which seeks solely to promote the equalization of bargaining power between producers and processors of perishable products." J.S. App at A20-A21. See also, J.S. App A22-A25.

Act, by analogy, regulates the activity of both handlers and associations. The system of regulation is clearly set forth in an affirmative manner. The action by a majority of producers in exercising a statutory right to seek to be represented by an association does not forfeit the regulatory-based antitrust exemption.

In *California Liquor Dealers Association* v *Midcal Aluminum, Inc., et al*, 445 US 97 (1980), a statutory wine pricing plan was held not to constitute "state action". The test applied there was twofold. First, the challanged restraint must be "one clearly articulated and affirmatively express a state policy"; second, the policy must be actively supervised by the state itself. 445 US at 105. The California system for wine pricing was held to satisfy the first standards, as the legislative policy was clear and forthrightly stated in the statute. This Court, however, held that the program did not meet the second requirement:

> "The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program."
> 445 US at 105-106.

Applying the *Midcal* test, the Michigan Act clearly meets the first requirement, as the legislative policy is both clear and forthright. As to the second requirement, while the Michigan Act authorizes collective bargaining between an accredited association and handler through which the terms of trade may be established, the parties are not necessarily left to their own devices. If the parties are unable to agree, binding

arbitration by three arbitrators, paid by both the state and the parties, is required. MCL 290.716; 290.717.

Moreover, neither the accreditation of an association nor the establishment of a bargaining unit is irreversible. When one third of the producers growing one third of the commodity request the disaccreditation of an association, its accreditation will be re-evaluated by the Board and may be revoked. MCL 290.712. While such a re-examination of accreditation is initiated by the farmers and not the State, it is no different than the referendum required in *Parker*. "The state itself exercised its legislative authority in making the regulation and prescribing the conditions of its application." 317 US at 352. Similarly, the required number of farmers needed for the disaccreditation of an association is one of these conditions.

The Michigan Act as originally enacted contained a "sunset provision", MCL 290.727, which would have terminated the act's effectiveness at September 1, 1976, saving only negotiations or arbitration proceedings in progress at that time. In 1976 the Governor signed a repealer act [1976 PA 155] removing the "sunset provision." Thus, a "pointed re-examination," and re-authorization, by the legislative and executive branches of Michigan's state government has taken place. Further, the Michigan Act has survived rigorous judicial scrutiny.

The "state action" doctrine developed by *Parker* and its progeny provides a basis for the constitutional validity of the Michigan Act. While the Michigan Supreme Court did not specifically refer to *Parker* in its opinion, it is clear that the Michigan Act constitutes sovereign "state action" as it has been interpreted by this Court through the years.

V.

AGRICULTURAL FAIR PRACTICES ACT DOES NOT CREATE OR SECURE A HANDLER'S "RIGHT" TO DEAL WITH WHICHEVER PRODUCERS THE HANDLERS CHOOSE AND THEREFORE DOES NOT PREEMPT THE MICHIGAN ACT

A. The Disclaimer Clause Only Limits Scope of Agricultural Fair Practices Act.

The second "conflict" alleged by Appellants is the "handler's right to deal individually with a farmer", a "right" said to arise out of 7 USC § 2304, the disclaimer section of the AFPA. It is contended that this section of the AFPA was enacted to make clear the limits of cooperative power. This contention does not square with a plain reading of that section or its legislative history.

7 USC § 2304 states:

> "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association."

The Michigan Act may not be said to force a handler to deal with an association inasmuch as it expressly provides otherwise:

> "At any time prior to 30 days before the first day of the marketing period, if an agreement on the issues in dispute between the accredited association and the handler has not been reached, the handler may elect not to purchase, directly or indirectly, any quantity of agricultural

commodity produced in the bargaining unit during the marketing period . . ." MCL 290.715.

Should the election afforded to the accredited association or handler not be exercised they then have 30 days to negotiate terms of trade. During this entire 30 day period the Board, on request of either party, will provide for mediation so as to "effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the association and the handler which could disrupt the normal sale and purchase of agricultural commodity between producers and handlers." MCL 290.714. But should there still be issues in dispute on the first day of the marketing period the parties are deemed to have consented to settlement by arbitration. MCL 290.716(1). This bargaining process establishes an orderly market[40] for agricultural commodities, a common objective of AFPA and the Michigan Act.

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[40]

See, e.g. testimony of Dr. Randall Torgerson, trial transcript, p 1091

". . . through the bargaining process, farmers can hopefully even out some of these peaks and valleys; namely, the valleys from the farmer's viewpoint and achieving higher degree of price stability in the marketplace and thereby hopefully better returns. Obviously, you know, farmers are in the business to make a profit, and they've got to be in a position given their increasing investment and the cost of doing business in farming to have returns. Their risk and uncertainty that they face as producers given this high investment increases daily, just because the cost of doing business and adoption of the various forms of technology and so on increases, so through the process of negotiation they have the opportunity, I think, to achieve more price certainty in the marketplace and to develop this more parity of bargaining power.

Then I would say in addition, I think through this, by virtue of having the ability, number one, to have representation, number two, to have a say in the pricing process which individually they did not have, the Act provides from the producer's viewpoint an orderly mechanism—an orderly process for arriving at price grading terms and other things that are subject to negotiation."

See also, testimony of Dr. James D. Shaffer, trial transcript, p 1558-1561.

The Michigan Supreme Court correctly interpreted 7 USC § 2304, finding that it was nothing more than what its heading said: a "disclaimer of intention to prohibit normal dealing."

> "The language of section 2304 does not justify the meaning plaintiffs assigned to it. The disclaimer provisions, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase 'nothing in this chapter', referring to the substantive and affirmative provisions of the FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. *There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do.* It did not in disclaiming any 'intention to prohibit normal dealing' thereby create or affirmatively protect an individual or handler's right to bargain with any producer, or an individual producer's right to bargain for himself. *It is simply,* aside from the disclaimer *neutral on that point.* Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that FAFPA did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity." [Emphasis added] (J.S. App at A8)

The announced congressional finding contained in the declaration of policy at 7 USC § 2301 is consistent with the holding of the Michigan Supreme Court. There is no evidence in that declaration which would indicate a congressional intent to

affirmatively create in the handler a right to deal individually with the farmer.

B. The Legislative History Is Devoid of Any Indication That A Right Was Either Created or Secured by the Inclusion of The Disclaimer Clause.

The purpose of 7 USC § 2304 can also be found in its legislative history. The Senate Report from the Agricultural and Forestry Committee with respect to 7 USC § 2304 disavows any intent that Congress was creating a right in a handler:

> "Section 5 [7 USC § 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. *The bill does not prevent or require these actions and is not intended to do so.* While the proponents of the bill state in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clean statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation and has recommended inclusion of this section in the bill.
>
> "There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent the sound reasons from operating.

"While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis it does not prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. Although the bill does not require a handler deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." [Emphasis added]

S. Rep No. 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong. & Ad. News, p 1873.

Representative Sisk, during the floor debate in the House echoed the purpose of the disclaimer section when he explained:

". . . As the members will note section 5 is a 'disclaimer'. Its purpose was to say what the bill did not intend to do, and thereby allay the fears of some of its opponents." See 114 Cong Rec 7464 (1968)

Given the legislative history of 7 USC § 2304, the Michigan Supreme Court was correct in concluding:

"Section 2304's disclaimer of any congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or as an expressed new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." (J.S. App at A14)

Appellants argue that two district court cases provide authority for the proposition that a handler has a "right" to deal directly with a producer. *Garrison* v *Dairymen, Inc,* Civ. Action No. 80-1080-3, slip opinion (D SC, July 28, 1980) involved producers of milk who sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. *Butz* v *Lawson Milk Co,* 386 F Supp 227 (ND Ohio 1974) concerned a handler that refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. Although both Courts ruled against handler coercion, Appellants argue that in so doing, the "right of the handler to deal individually" with producers was found. Such an argument is directly traceable to *Butz, supra.* Upon a close reading of that case, however, it is clear that the "right" of the handler to which the Court was referring was not a statutory right but a pre-existing contractual right.

In *Butz,* a producer of milk had contracted with Lawson, a processor-handler. Under the terms of the contract the producer pledged that he had no agreement with an association to sell any milk which he produced. The contract further provided that if the producer entered into an agreement authorizing an association to sell his milk, Lawson would be relieved of all further obligations to purchase from the producer. Nevertheless, the producer did enter into a marketing agreement with an association.

The marketing agreement appointed the association as the sole and exclusive agent to sell all milk produced by the producer. In addition, it was provided that all other agreements or contracts with respect to the sale of milk were superseded so long as no conflict occurred with existing contracts. In the event that a conflict did occur between the marketing agreement and a pre-existing contract, the marketing agreement provided that the producer agreed to terminate such a

contract at the earliest possible date. When notified that the producer entered into a marketing agreement, Lawson immediately terminated its contract with the producer.

The ultimate conclusion of the district court was that Lawson's termination of its contract with the producer was unlawful and in violation of 7 USC § 2303(a) in that it represented a refusal to deal with the producer solely because of his joining the association. This result was based on the fact that under the terms of the contract and marketing agreement the producer might have been permitted to deal directly with Lawson despite the marketing agreement with the association. The Court's statement that 7 USC § 2304 is "to protect the right of the handler to continue to deal wih one of its producers directly even though he may become a member of an association," *Butz*, 386 F Supp at 227, was in reference to the pre-existing contractual right which Lawson had with the producer and which was still viable despite the fact that the producer had entered into a marketing agreement with the association. It was not a finding that 7 USC § 2304 created a "right" in that handler, or any other, to deal individually with the producer.

Neither *Garrison* nor *Butz*, stand for the proposition that the Michigan Act's requirement for exclusive representation for all growers of an agricultural commodity is in conflict with the AFPA. Moreover, if a handler does have a "right" to deal individually with producers who have joined an association, the prohibited practices sections of the AFPA would be rendered meaningless.

Whether compliance with both the AFPA and Michigan Act is a physical impossibility was resolved at trial. The Michigan Supreme Court rejected Appellants' argument that compliance with the AFPA and the Michigan Act is physically impossible, and in so holding distinguished both *Butz* and

Garrison (J.S. App at A16-A17). Moreover, it was testified at trial that the operation of marketing and bargaining under the Michigan Act will not "trigger" federal enforcement action under the AFPA. This fact was noted by the trial court when it stated in its opinion:

> "The plaintiffs have directed the Court to *Jones* v *Rath Packing, supra,* for the proposition that the federal government has preempted the field of regulation. This case, as the Court understands it, stands for the proposition that state law must fall if it 'triggers' federal enforcement action.
>
> *There is nothing in the proofs which would convince the Court of this possibility. In fact the proofs appear to the contrary. Witness Torgerson, a USDA official, indicated compliance with AMABA would not 'trigger' federal enforcement of AFPA.*" [Emphasis added] (J.S. App A74). See also, J.S. App A6-A11.

In light of the foregoing it is clear that the disclaimer section (7 USC § 2304) of the AFPA neither creates nor secures a handler's "right" to deal with whomever a handler may choose. Therefore, there is no preemption of the Michigan Act by the AFPA in this regard.

CONCLUSION

Appellee State of Michigan, Marketing and Bargaining Board, prays that this Honorable Court declare that the Michigan Act is not preempted by the AFPA and therefore constitutional; that the judgment of the Michigan Supreme Court be affirmed; and that this Appellee be awarded its costs.

Respectfully submitted,

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Dated: December 29, 1983